

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

WALTER MERCADO-SALINAS, et al.,

Plaintiffs,

v.

BART ENTERPRISES  
INTERNATIONAL, LTD., et al.,

Defendants.

Civil No. 09-1509 (GAG)

**OPINION and ORDER**

Walter Mercado-Salinas (“Mercado”) and Astromundo, Inc. (collectively “Plaintiffs”) brought this case in the Puerto Rico Court of First Instance against Bart Enterprises International, LTD. (“Bart”), Walter International Productions, Inc., Waltervision, Inc., Waltervision Productions, Inc. (“Waltervision Productions”), Walter Mercado Radio Productions, Inc., Walter Mercado Enterprises, Corp., Arcane Creative LLC (“Arcane”) and Guillermo Bakula (“Bakula”) (collectively “Defendants”). (See Docket Nos. 1 and 4.) Defendants removed this case to the federal district court. (See Docket No. 1.) The claims involved in this case are complex and have been thoroughly detailed in numerous opinions and orders by various federal courts prior to these motions *in limine*. Therefore, it is sufficient to state the main contention at this point is the determination of the trademark owner, whether any compensation is due for the rights of the Mark and whether the non-ownership parties have infringed upon the Mark.

The present matter involves three motions *in limine* submitted by Plaintiffs. The first seeks to exclude a number of Defendants’ proposed exhibits due to *res judicata*, non-relevancy and hearsay. (See Docket No. 500.) Defendants opposed the motion at Docket No. 519. The second motion seeks to exclude the expert report and testimony of Leonard Cusano (“Cusano”). (See Docket No. 501.) Plaintiffs argue this testimony should be excluded because the testimony is irrelevant to the present suit and because Cusano’s testimony does not qualify as expert testimony

Civil No. 09-1509 (GAG)

2

1 as required by Rule 702 and Daubert v. Merrell Dow Pharm., 509 U.S. 579, 597 (1993). (See  
2 Docket No. 501 at 4, 9.) Defendants opposed the motion at Docket No. 520. Finally, Plaintiffs seek  
3 to exclude six witnesses for the defense as well as certain topics from the testimony of Bill Bakula's  
4 ("Bakula") testimony. (See Docket No. 502.) Defendants opposed the motion at Docket No. 518.  
5 For the following reasons the court **GRANTS IN PART and DENIES IN PART** Plaintiffs' motion  
6 at Docket No. 500, the court **GRANTS** Plaintiffs' motion to exclude Cusano's testimony at Docket  
7 No. 501, and the court **GRANTS IN PART and DENIES IN PART** Plaintiffs' motion to exclude  
8 Defendants' witnesses at Docket No. 502.

9 **I. Legal Standard**

10 The admission of expert testimony is governed by Federal Rule of Evidence 702. That rule  
11 provides that:

12 [a] witness who is qualified as an expert by knowledge, skill, experience, training,  
13 or education may testify in the form of an opinion or otherwise if: (a) the expert's  
14 scientific, technical, or other specialized knowledge will help the trier of fact to  
15 understand the evidence or to determine a fact in issue; (b) the testimony is based on  
sufficient facts or data; (c) the testimony is the product of reliable principles and  
methods; and (d) the expert has reliably applied the principles and methods to the  
facts of the case.

16 FED.R.EVID. 702.

17 The trial court acts as a gate-keeper as the judge must ensure an expert's testimony is both  
18 relevant and is based on a reliable foundation. See Daubert, 509 U.S. 579 at 597 (1993); U.S. v.  
19 Mooney, 315 F.3d 54, 62 (1st Cir. 2002).

20 The Daubert Court identified four factors that may assist the trial court in determining  
21 whether or not scientific expert testimony was reliable: "(1) whether the theory or technique can be  
22 and has been tested; (2) whether the technique has been subject to peer review and publication; (3)  
23 the technique's known or potential rate of error; and (4) the level of the theory or technique's  
24 acceptance within the relevant discipline." Mooney, 315 F.3d at 62 (citing Daubert, 509 U.S. at  
25 593-94). These factors were later held to apply to all expert testimony, not just scientific testimony.  
26 See Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999). The factors are not a checklist for  
27 the trial judge to follow, but rather the inquiry is a flexible one, allowing the trial judge to determine  
28 and adapt these factors to fit the particular case at bar. See Kumho, 526 U.S. at 150; Milward v.

1 Acuity Specialty Prods. Grp., Inc., 639 F.3d 11, 15-16 (1st Cir. 2011). “Proponents . . . do not have  
2 to demonstrate that the assessments of their experts are correct, only that their opinions are reliable.”  
3 Rivera-Cruz v. Latimer, Biaggi, Rachid & Godreau, LLP, 2008 WL 2446331 at \*2 (D.P.R. June 16,  
4 2008) (citing Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77, 85 (1st Cir. 1998)).  
5 While the general focus of this inquiry is the principles and methodology relied upon by the expert,  
6 the court may consider the congruity of the data and the opinion proffered by the expert. See Gen.  
7 Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997) (holding a court may conclude there is too great an  
8 analytical gap between data and the opinion proffered); Ruiz-Troche, 161 F.3d at 81.

## 9 **II. Legal Analysis**

10 All three motions seek to exclude evidence based on res judicata. Therefore, a brief  
11 discussion regarding claim preclusion principles is warranted before discussing the details of each  
12 motion.

### 13 **A. Claim Preclusion (Res Judicata)**

14 “The doctrine of res judicata dictates that ‘a final judgment on the merits of an action  
15 precludes the parties from relitigating claims that were or could have been raised in the prior  
16 action.’” Haag v. Shulman, 683 F.3d 26, 30 (1st Cir. 2012) (quoting Haag v. U.S., 589 F.3d 43, 45  
17 (1st Cir. 2009)). Under federal law, claim preclusion applies when three requirements are present:  
18 “(1) a final judgment on the merits in an earlier action; (2) an identity of the cause of action in both  
19 the earlier and later suits; and (3) an identity of parties or privies in the two suits.” Kale v.  
20 Combined Ins. Co. of America, 924 F.2d 1161, 1165 (1st Cir. 1991). Pertinent to the second prong,  
21 the First Circuit has held, “[a] single cause of action can manifest itself in an outpouring of different  
22 claims, based variously on federal statutes, state statutes, and the common law . . . . [A]s long as the  
23 new complaint grows out of the same transaction or series of connected transactions as the old  
24 complaint, the causes of action are considered to be identical for res judicata purposes.”  
25 Havercombe v. Department of Educ. of Com. of P.R., 250 F.3d 1, 3-4 (1st Cir. 2001) (quoting Kale,  
26 924 F.2d at 1166. In other words, the identity requirement is met so long as the two claims have the  
27 same nucleus of operative facts, even if the exact issue was not previously litigated. See Aunyx  
28 Corp. v. Canon U.S.A., Inc., 978 F.2d 3, 7 (1st Cir. 1992) (citing Kale, 924 F.2d at 1166).

**B. Bart's Trademark Infringement Claim Against Plaintiffs**

Plaintiffs seek exclusion of various pieces of Defendants' proposed evidence due to *res judicata* in all three of their motions *in limine*. The thrust of all these arguments is that Bart and Defendants are barred from now asserting any claims and damages that could have been brought with the Florida litigation. (See Docket Nos. 500 at 11, 501 at 4, & 502 at 5.) The court has been clear from the beginning that *res judicata* will bar any attempt by either party to re-litigate issues that were, or could have been brought in front of the Florida court. (See Docket Nos. 220 at 9 ("As the same parties appear in both cases, the prior decision precludes any arguments that repeat issues that were previously decided."); 451 at 2 ("Moreover, the court highlights that the reversion issue has already been determined by the Florida Court.")). Therefore, it should have been clear to all parties that claim preclusion would apply to the current litigation.

To this end, the court must rule whether Defendants may now seek damages due to any trademark infringement committed by Plaintiffs prior to 2009. The court finds claim preclusion bars Defendants from seeking such damages. Defendants, Bart as well as the various corporations licensed to use the Mark, brought an action in Florida alleging breach of contract due to Mercado's attempted termination of the contract in November of 2006. That case ended with a jury not awarding Bart and its affiliates any damages due to Mercado's actions. The jury also held that Bart was the rightfully owner of the Mark. Any damages suffered by Defendants due to Plaintiffs infringing use of the Mark could have, and should have, been brought during the Florida litigation. It is uncontested the parties in the Florida litigation and this litigation are the same. It is also uncontested that there is a final judgment on the merits in that case. Therefore, the only prong of the claim preclusion analysis the court need address is the identity of the cause of action.

The causes of action between the Florida litigation and the current litigation satisfy the identity prong because they share the same nucleus of operative facts. After Mercado attempted to terminate the agreement in 2006, Defendants brought suit for damages. Any damages due to trademark infringement by Plaintiffs could have been asserted in that litigation. Defendants rightly point out to the court that the Florida litigation was not an action for trademark infringement. (See Docket No. 520 at 3.) The Florida court mooted Plaintiffs' trademark infringement claim because

1 the jury found Defendants to be the rightful owner of the Mark.<sup>1</sup> In other words, the Florida  
2 litigation was not a trademark infringement case because Defendants chose not to assert a trademark  
3 infringement claim. Plaintiffs were the ones to assert a claim for trademark infringement and when  
4 the jury found Defendants to be the owner of the Mark, the court mooted the claim. There were no  
5 roadblocks for Defendants alleging a claim of trademark infringement in the Florida litigation. As  
6 such, the claim could have been brought at that time. Therefore, Defendants cannot now assert a  
7 claim for damages due to Plaintiffs actions pertinent to Mercado's 2006 breach of contract.

8 Finally, this ruling should not be construed to quash any and all evidence of damages due to  
9 trademark infringement. The ruling only excludes evidence of damages between 2006 and 2009.  
10 When Mercado attempted to terminate the contract for a second time in 2009, the operative facts of  
11 the present litigation, Defendants may have sustained damages. Those facts and the possible  
12 damages subsequent to those events are the substance of this litigation. Defendants may bring  
13 evidence of damages sustained subsequent to 2009 as these claims involve a separate and distinct  
14 set of operative facts. Claim preclusion does not bar such testimony. Therefore, for the purposes  
15 of the current motions *in limine* and upcoming trial, any evidence proffered for the use of  
16 demonstrating trademark infringement stemming from Mercado's failed termination attempt of  
17 2006, or damages thereof, shall be excluded. With this ruling in mind, the court analyzes the three  
18 motions *in limine* presently before the court.

---

19  
20  
21 <sup>1</sup> The Florida court specifically stated:

22 However, the trademark infringement was never tried. Once the jury  
23 found that Mercado, not Bart had breached the contract and that  
24 Mercado had not properly terminated the contract, the claim for  
25 trademark infringement became moot because, as stated in the order  
26 on motions for summary judgment, the trademark rights revert back  
27 to Mercado [only] upon a valid termination of the agreement.  
Because the jury found that there was no valid termination, no event  
had occurred that would cause the trademark rights to revert to  
Mercado. Thus, the claim for tm infringement was moot and  
impliedly dismissed. (D.E. #439).

**C. Motion *in limine* at Docket No. 500****1. Defendants' Exhibit Nos. 1-13; 58-63; 164-165<sup>2</sup>**

Plaintiffs first seek to exclude twenty exhibits of Defendants arguing the documents are irrelevant. The documents consist of trademark applications, registrations and communications between the parties. (See Docket No. 500 at 5.) Defendants proffer these documents to demonstrate Mercado's intent to irrevocably assign the Mark to Defendants at the time of the agreement. (See Docket No. 519 at 3.) The intent of the parties is the essential question of this litigation; however, the court cannot agree that these documents prove what the parties intended when signing the Agreement back in 1995. A specific condition of the Agreement assigns the Mark to Defendants and allow them to register the Mark in their name. (See Docket No. 378-1 at 4 ("Bart shall have all rights in the Mark which are afforded to owners of trademarks and service marks, including but not limited tot he right to seek and obtain trademark protection and/or registration of the Mark in its name . . . .")). The current registration holder of the Mark is not in question. It is stipulated by the parties that pursuant to the terms of the Agreement, Bart registered the Mark throughout various parts of the world. These documents are not necessary to prove that Bart registered the Mark, nor will these documents assist the jury in determining the intention of the parties when the Agreement was signed in 1995. Bart's actions pursuant to the express terms of the Agreement do not shed light as to what compensation the parties intended for the Mark. Therefore, these documents are irrelevant to the present litigation. Plaintiff's motion *in limine* to exclude these documents is **GRANTED.**

**2. Defendants' Exhibits Nos. 14-16; 48-57; 72; 77; 181-183****a. Exhibit Nos. 14-16; 54-57; 72; 77**

---

<sup>2</sup> To simplify the evidentiary record for the court and the parties, all references to Defendants' exhibits refers to the 193 exhibits which are listed at Docket No. 480. Plaintiffs only seek to exclude evidence contained within that list. As such, the court will refer directly to the exhibit number, rather than the entire docket number. For example, Plaintiffs seek to exclude the first exhibit contained on Defendants' exhibit list in this motion. The court shall refer to this as "Exhibit No. 1" as opposed to "Docket No. 480 at 104; No. 1."

1           These documents consist of communications between counsel for all parties. Defendants  
2 claim these letters will assist the jury in assessing damages because they demonstrate Plaintiffs'  
3 violations of the Mark and Defendants' responses. These letters read like answers to law school  
4 exams. The contents of the letters clearly communicate each party's theory of why Plaintiffs' actions  
5 are in violation of the Mark or not. The jury must decide this case on the facts, not on legal  
6 memoranda and theory. The only fact these letters prove is that Defendants believe Plaintiffs  
7 infringed on the Mark. The rest of the contents are so saturated with the legal implications and rules  
8 that they would not be beneficial to the jury. The court agrees with Plaintiffs that these letters will  
9 not assist the jury and are therefore not relevant to the present matter. Any relevance the letter may  
10 contain would be far outmatched by the confusion to the jury who is not being asked to interpret the  
11 legal implications of the Florida litigation, but rather is being asked to discern who currently owns  
12 the Mark, and what if any damages have been inflicted to the owner since 2009. Therefore, the court  
13 **GRANTS** Plaintiffs' motion at Docket No. 500 as to these documents.

14                           **b.       Exhibit Nos. 48-53**

15           These pieces of evidence are letters sent by Defendants to Mercado requesting his personal  
16 services in early 2009. These letters shall be excluded as it has been conclusively established that  
17 Mercado was under no obligation to provide personal services to Defendants after 2007. This was  
18 a major contention in the Florida litigation and this court has previously discussed the preclusive  
19 effects of the Florida judgment. Defendant was under no obligation to render personal services at  
20 the time the letters were sent. Therefore, the court **GRANTS** Plaintiffs' motion to exclude these  
21 documents.

22                           **c.       Exhibit Nos. 181-183**

23           Little discussion is warranted regarding these three documents. All three are contracts  
24 between Mercado and Jamie Shoop & Associates, Inc., led by Bakula. These contracts represent  
25 work previously performed by Mercado. This agreement is completely irrelevant and not in  
26 controversy at the present time. Defendants argument that these documents somehow shed light as  
27 to the 1995 Agreement between Mercado and Bart, also led by Bakula, is unpersuasive. The 1995  
28



Civil No. 09-1509 (GAG)

8

1 Agreement is at issue in this case. The contracts previously signed by the parties will not enhance  
2 the jury's ability to discern the intention of the parties for the 1995 Agreement. There are very little  
3 similarities between the Shoop agreement and the 1995 Agreement. As such, the court **GRANTS**  
4 Plaintiffs' motion to exclude these documents.

5 **3. Defendants Exhibit Nos. 17-28; 34-47; 64-71; 73-76; 81; 116-119; 125-**  
6 **131; 156-163; 168-179; 184-192**

7 Plaintiffs primary contention for excluding these documents is that Defendants used these  
8 documents in the Florida litigation and, therefore, they are not relevant to the present litigation.

9 **a. Exhibit Nos. 17-19; 20-28; 34-46; 76; 81; 129-131; 156-163; 171-**  
10 **173; 175-177; 184-192**

11 The court must state that when a piece of evidence is used in a prior trial, that does not  
12 necessarily mean the evidence cannot be used in a subsequent trial. The scope and nature of the  
13 trials dictate whether there are any preclusive effects regarding the evidence. The court explained  
14 at length what preclusive effect the Florida litigation has on the current litigation. The court shall  
15 not exclude evidence simply because has been previously used in the Florida litigation; however,  
16 documents shall be excluded that are used as a means to demonstrate pre-2009 non-performance or  
17 damages. While there is a trademark infringement claim in the present case, no evidence of pre-  
18 2009 infringement shall be allowed. For these reasons, the court **GRANTS** Plaintiffs motion *in*  
19 *limine* to exclude the following Exhibit Nos. 17-19; 20-28; 34-46; 76; 81; 129-131; 156-162; 171-  
20 173; 175-177; 184-192. The court **DENIES** Plaintiffs' motion as it pertains to Defendants' Exhibit  
21 No. 163 as this letters is dated February 24, 2010.<sup>3</sup>

22 **b. Exhibit Nos. 64-71**

23 These documents represent filings and orders from the Florida litigation. Defendants do not  
24 address why these documents are included among their exhibits for this case. The court can think  
25 of no argument as to why these documents will assist the jury. Therefore, exclusion is warranted.

---

26  
27 <sup>3</sup> The court notes only a Spanish language version of the document has been submitted and  
28 a translation must be used by Defendants for trial.



Civil No. 09-1509 (GAG)

9

1 The court **GRANTS** Plaintiffs' motion to exclude Exhibit Nos. 64-71.

2 **c. Exhibit Nos. 73-75**

3 Plaintiffs argue these communications should be excluded pursuant to the same claim  
4 preclusion argument previously discussed. The court agrees and **GRANTS** exclusion for Exhibit  
5 Nos. 73 and 74. However, the court **DENIES** Plaintiffs' motion to exclude Exhibit No. 75. This  
6 message is dated October 13, 2009, well after the Florida litigation ended and Mercado attempted  
7 to terminate the contract for a second time. This evidence is relevant as it goes to Mercado's activity  
8 post 2009, the time frame under consideration by the court.

9 **d. Exhibits 116-119; 125-128; 168-170; 174; 178-179**

10 The court is unable to completely rule on the admissibility of these documents because  
11 copies have not been provided to the court of Exhibit Nos. 116-119. The courtesy copy of  
12 Defendants' exhibits provided to the court by Plaintiffs seems to have mistakenly omitted these  
13 documents. However, judging from the description of said exhibits provided by Defendants, it  
14 seems parts of the omitted documents would be excluded as they deal with monthly settlement prior  
15 to 2009, going back as far as 2005. However, without being able to examine the actual documents,  
16 the court cannot rule in Plaintiffs favor. Therefore, the court **DENIES without prejudice** Plaintiffs'  
17 motion to exclude Exhibit Nos. 116-119. Plaintiffs shall submit these exhibits on or before  
18 December 27, 2012, unless the case is settled. Any response to Plaintiffs submission is due by  
19 December 28, 2012. These deadlines are final.

20 As for the rest of the documents, the court has examined the documents and finds they all  
21 refer to time periods covered in the Florida litigation and, thus, not relevant to the present suit.  
22 Therefore, the court **GRANTS** Plaintiffs' motion to exclude Exhibit Nos. 125-128, 168-170, 174,  
23 178-179.

24 **4. Defendants Exhibits Nos. 29-35; 184-192**

25 Plaintiffs' objection to these documents rests on hearsay grounds. Pointing out that most of  
26 these documents are copies of magazine and newspaper articles, Plaintiffs argue any use by  
27 Defendants to prove the matter asserted in the articles would be hearsay and inadmissible at trial.  
28

1 Defendants do not address this argument by Plaintiffs in their brief. The court agrees with Plaintiffs  
2 that using these materials in order to prove a matter asserted within the article would be hearsay.  
3 In looking at the content of the articles, it seems apparent the intended use is for demonstrating the  
4 truth of events contained in the article. Given Defendants silence on this issue, it seems this is the  
5 intended use. Additionally, many of these documents have been excluded for other reasons  
6 contained within this opinion and order. Therefore, the court **GRANTS** Plaintiffs' motion to  
7 exclude these documents, Exhibit Nos. 29-35; 184-192.

8 **5. Defendants Exhibits Nos. 78-80; 82-86; 93; 106; 111; 113**

9 Pertaining to exhibits 78-80, Plaintiffs' seek exclusion of these agreements that have been  
10 redacted because Defendants have yet to produce unredacted copies. This issue is presently before  
11 Magistrate Judge McGiverin who will determine whether sanctions are appropriate for this conduct.  
12 (See Docket No. 487.) As such, the court will not issue a ruling pertaining to exhibits 78-80 at this  
13 time and may revisit the issue once Judge McGiverin has issued his ruling.

14 As for the remaining documents, the court finds them to be unfairly prejudicial. Plaintiffs  
15 argue the doctrine of completeness requires the exclusion, but the doctrine of completeness only  
16 allows one party to introduce an unredacted copy of evidence after opposing counsel has introduced  
17 a redacted copy. In this case, there are no unredacted copies. Therefore, allowing Defendants to use  
18 redacted copies, without allowing Plaintiffs to argue rates or totals to the jury would be unfairly  
19 prejudicial to Plaintiffs. Therefore, the court **GRANTS** exclusion based on Federal Rule of  
20 Evidence 403.

21 For the reasons stated above, the court **GRANTS IN PART and DENIES IN PART**  
22 Plaintiffs' motion *in limine* to exclude Defendants' documentary evidence at Docket No. 500. The  
23 court **GRANTS** the motion for Exhibit Nos. 1-46; 48-74; 76-77; 81-86; 93; 106; 111; 113; 125-131;  
24 156-162; 164-165; 168-179; 181-192. The court **DENIES** Plaintiffs' motion to exclude Exhibit  
25 Nos. 75; 78-80; 116-119; 163.

26 **D. Motion *in limine* at Docket No. 501**

27

28

1  
2  
3 Plaintiffs initial argument is that Cusano's testimony is barred by *res judicata* because all the  
4 testimony is derived from Mercado's breach of contract that was the subject of the Florida litigation.  
5 (See Docket No. 501 at 4-9.) Defendants contend Cusano's testimony is relevant to the damages  
6 Defendants suffered due to Plaintiffs' infringement on the Mark. (See Docket No. 520 at 3.) As a  
7 secondary argument Plaintiffs contend that Cusano's report is unreliable due to its methodology.  
8 Defendants counter that the testimony should go to the jury who is free to place as much or little  
9 weight on Cusano's testimony as it deems proper.

10 **1. Claim Preclusion Applies to Cusano's Report**

11 At this point there can be no doubt that the jury in the Florida litigation found Mercado  
12 breached the contract for personal services and that Defendants did not sustain any damages. See  
13 Walter International Productions v. Mercado Salinas, 650 F.3d 1402, 1406 (11th Cir. 2011). At the  
14 beginning of this opinion and order the court analyzed the types of evidence *res judicata* would  
15 prevent in this case. Certainly, if the jury decides Mercado did not validly terminate the contract,  
16 then the Mark remains the property of Defendants. Defendants can seek damages due to Plaintiffs'  
17 infringement of the mark subsequent to the 2009 termination letter sent by Mercado because that  
18 claim was not decided by jury in the Florida litigation.

19 Defendants are correct when they claim Cusado testimony focuses on the damages due to  
20 trademark infringement, rather than Mercado's breach of contract in 2006. The problem before the  
21 court is the manner in which the report has been drafted and written. Plaintiffs point to Cusano's  
22 deposition in which he clearly states he calculated damages based on the time of Mercado's first  
23 attempt to terminate the contract in 2006. (See Docket No. 501 at 4.) Also, Cusano seemed  
24 completely unaware of Mercado's second attempt to terminate the contract in 2009. (See *id.* at 5.)  
25 These excerpts, taken together, along with Defendants' claim that trademark infringement damages  
26 are relevant to this action as far back as 2006 and a review of the report itself, demonstrate the report  
27 is premised on the assumption that damages may be sought from the 2006 termination attempt by  
28

1 Mercado. That is incorrect. Parts of the report may be relevant and it is possible Cusado's figures  
2 could be re-calculated to represent the relevant time frame, but the court cannot find a bright line to  
3 do this with the report. In its present state, the report cannot be used and Cusado cannot testify as  
4 to the findings of the report. Simply put, the basis for the report is inaccurate and the court cannot  
5 allow misleading testimony to be given to the jury. For this reason, the court **GRANTS** Plaintiffs'  
6 motion to exclude the testimony of Cusado and his report at Docket No. 501.

7 **2. Whether Cusado's Testimony Meets the Daubert Standard**

8 As an alternative, Plaintiffs seek to exclude Cusado's testimony because it is not reliable.  
9 (See Docket No. 501 at 9.) It is unnecessary for the court to analyze this testimony under the  
10 Daubert standard because the court has excluded the testimony on alternative grounds. However,  
11 it is worth noting that parts of the report seem very unscientific. Cusado states he simply assumed  
12 all increases in Plaintiffs' income were directly due to their infringing activity. (See Docket No. 501  
13 at 11.) Without any evidence or figures to rely upon, this assumption is made regarding Plaintiffs'  
14 income. The court must act as a gate-keeper when it comes to expert testimony. This analysis by  
15 Cusado, while draped as expert, seems extremely superficial. Similarly, the court notes Cusado  
16 again shunned hard numbers when he assumed Mercado enjoyed a 9% increase of income for 2009  
17 and 2010. (See Docket No. 501-3 at 14.) Cusado may not have had the relevant information  
18 necessary to make his calculations and Cusado may have done the best with the limited information  
19 available, but the court cannot allow assumptions and guesses to form the basis of expert testimony  
20 to then be delivered to the jury. As such, even if the report was not excluded for other reasons, the  
21 court would be inclined to exclude this testimony pursuant to Federal Rule of Evidence 702.

22 **E. Motion *in limine* at Docket No. 502**

23 Plaintiffs' final motion *in limine* seeks to exclude various witnesses and testimony due to  
24 claim preclusion, as well as failure to properly disclose the identity and specific testimony to be  
25 proffered. (See Docket No. 502.)

26 **1. Testimony of Bill Bakula**

27 There is no reason to beat a dead horse. Plaintiffs' seek to limit Bakula's testimony to the  
28

1 present claims. The court agrees. Plaintiffs' do not seek to exclude all of Bakula's testimony and  
2 Bakula will be allowed to testify as to relevant matters. If matters not relevant are introduced at trial,  
3 the court shall be vigilant and sustain any timely objection. The court is convinced Plaintiffs'  
4 counsel will be on the look-out and timely raise any warranted objection. As such, the court  
5 **DENIES** Plaintiffs' motion at this time and, if necessary, shall address any such issues during the  
6 course of trial.

7 **2. Testimony of Marisela Carvajal**

8 Plaintiffs' motion as to Carvajal is **DENIED**. Carvajal's testimony is relevant as to  
9 payments to Plaintiffs' for use of the Mark. Defendants state no payments were made to Plaintiffs'  
10 for use of the Mark at any time, either pre-2006 or post-2006. Their case relies on their  
11 interpretation that no monies were ever paid to Plaintiffs for use of the Mark. Carvajal, as  
12 bookkeeper for Defendants, has information pertaining to the payments to Plaintiffs'. While  
13 Carvajal's testimony shall be monitored in the same fashion as Bakula's, her testimony shall not be  
14 excluded prior to trial.

15 **3. Daisy Villegas and Arya Towifghi**

16 These witnesses are offered to demonstrate trademark infringement by Plaintiffs. (See  
17 Docket No. 518 at 3.) Villegas would testify as to the contract between Plaintiffs and Lanman &  
18 Kemp-Barclay. This agreement was dated September 6, 2007, clearly before the relevant time frame  
19 for this action. Therefore, the court **GRANTS** Plaintiff's motion as to Villegas.

20 As for Towifghi, the same holds true. The court does not have a specific date for the contract  
21 central to her testimony, but the contract was finalized and part of the Florida litigation, meaning it  
22 must have been signed no later than late 2008. As such, the preclusion effects of *res judicata* will  
23 not allow such re-litigation of issues that could have been brought previously. The court **GRANTS**  
24 Plaintiffs' motion as to Towifghi.

25 **4. Testimony of Harper Collins Publishing, Hernan Gonzalez and Miguel**  
26 **Angel Carpio**

27 Plaintiffs' seek exclusion of these witnesses due to the non-identification of whom from  
28

Civil No. 09-1509 (GAG)

14

1 Harper Collins is expected to testify and the non-disclosure of Gonzalez and Angel Carpio. (See  
2 Docket No. 502 at 10-11.) Defendants do not argue these assertions. As the motion is uncontested  
3 for these witnesses, the court **GRANTS** Plaintiffs' motion to exclude. Witnesses must be identified  
4 prior to trial and announced to opposing counsel. See FED. R. CIV. P. 26(a) & 37(c).

5 For these reasons the court **GRANTS IN PART and DENIES IN PART** Plaintiffs' motion  
6 *in limine* at Docket No. 502.

7 **III. Conclusion**

8 For the foregoing reasons the court **GRANTS IN PART and DENIES IN PART** Plaintiffs'  
9 motion at Docket No. 500, the court **GRANTS** Plaintiffs' motion to exclude Cusano's testimony  
10 at Docket No. 501, and the court **GRANTS IN PART and DENIES IN PART** Plaintiffs' motion  
11 to exclude Defendants' witnesses at Docket No. 502.

12  
13 **SO ORDERED.**

14 In San Juan, Puerto Rico this 24th day of December, 2012.

15 *S/ Gustavo A. Gelpí*  
16 GUSTAVO A. GELPÍ  
17 United States District Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28